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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-202942 DATE: August 25, 1981

MATTER OF: Lanson Industries, Inc.

DIGEST:

1. Issuance of competitive request for proposals was not in derogation of option for same items under current contract because option in protester's existing contract was not actually exercised.

2. Where record shows, as here, that option is exercisable at sole discretion of Government, GAO will not consider, under Bid Protest Procedures, incumbent contractor's contention that agency should have exercised or is obligated to exercise contract option provisions.

3. Where contracting officer did not actually execute modification exercising option, GAO concludes that evidence is insufficient to establish that binding agreement exercising option arose by actions of parties.

4. GAO has no basis to object to agency's determination to use negotiated procurement method because adequate time is unavailable to assemble proper data package suitable for formal advertising and agency has no basis to restrict competition to companies in specialized container field.

5. Protester contends that it has competitive disadvantage because it previously acquired necessary equipment and has no need for Government-furnished equipment which is to be furnished at no cost to successful offeror. Agency has no legal obligation to eliminate protester's competitive disadvantage because protester's situation did not result from preference or unfair action by agency.

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Lanson Industries, Inc. (Lanson), protests the issuance of request for proposals (RFP) No. F33657-81-R-0319 by the Air Force for A-10, 30mm ammunition container assemblies.

Lanson contends that the Air Force has no need to conduct the procurement because the Air Force satisfied its requirement for these assemblies by exercising the option in Lanson's current contract (No. F33657-80-C-0043) with the Air Force for these assemblies. Alternatively, Lanson contends that the Air Force is obligated to exercise its option in lieu of conducting a competitive procurement. Lanson also argues that, if a competition is proper, then there should be an evaluation factor included in the RFP to reflect the rental value of Government-furnished equipment that offerors propose to use in performing the contract.

The Air Force reports that it did not exercise the option in Lanson's current contract, it is not obligated to exercise the option, and it will permit the successful offeror to use the Government-furnished equipment, making an evaluation factor unnecessary.

We conclude that Lanson's protest is without merit.

Lanson's current contract, awarded competitively, contained a requirement for a basic quantity of 19,500 units and an option quantity of 13,500 units. The option quantity was considered in the evaluation of proposals. The Air Force needed more units than the basic quantity but funding was available for only 11,084 units. Discussions between the Air Force and Lanson and Lanson's letter dated January 13, 1981, agreeing to a reduced quantity, led to the preparation of modification P00004 to change the option quantity from 13,500 to 11,084. At the Air Force's request, Lanson's president went to Wright-Patterson Air Force Base and executed the modification. That day, the Air Force sent a letter dated January 21, 1981, to Lanson enclosing a copy of the unexecuted modification, stamped "advance copy for information only." Before the contracting officer executed the modification, the Air Force

received an unsolicited proposal from Wayne H. Coloney Company, Inc. (Coloney), which indicated that the Air Force could realize substantial savings by conducting a competitive procurement in lieu of exercising the Lanson option. On January 23, 1981, after receipt of the Coloney proposal, the Air Force notified Lanson that the exercise of the option would be delayed or prevented. Shortly thereafter, the Air Force notified Lanson of its intention to test the market instead of exercising the option.

First, Lanson contends that the Air Force's January 21, 1981, letter constituted the written notice contemplated by the procurement regulations, indicating that the option was exercised by the Air Force. Lanson argues that the Air Force's request that its president visit Wright-Patterson Air Force Base to execute the modification supports its contention that a mutually binding obligation was created by the January 21, 1981, letter. In Lanson's view, the Air Force has no need to issue the RFP.

In response, the Air Force reports that it did not exercise the option because it did not execute the modification. The Air Force explains that it would have exercised the option by (1) executing the modification reducing the option quantity and (2) issuing notice that the Air Force was exercising the option for the reduced quantity; neither of the events occurred.

The modification states on page 1A that the supplemental agreement "shall be subject to the written approval of the Secretary or his duly authorized representative and shall not be binding until approved." While Lanson's president executed the modification, the Air Force's contracting officer did not. Further, the January 21, 1981, letter transmitted two copies of the modification marked "advance copy for information only" and requested Lanson to execute one copy and return it to the Air Force. We find no evidence in the January 21, 1981, letter or any other document in the record that the Air Force intended to exercise the option prior to the time its contracting officer would execute the modification, which did not occur. Thus, we must conclude that the Air Force did not actually exercise its option in the Lanson contract.

Second, Lanson contends that the Air Force had an obligation to exercise the option because the Air Force evaluated the option price in selecting Lanson for its current contract on the grounds that (1) there was a known requirement and (2) realistic competition for the option quantity was impracticable. Lanson argues that it relied on these factors and concluded that the option quantity would not be subject to a second competition. Lanson states that the only risk it took was that funds would not be available.

In response, the Air Force contends that the exercise of the option was the unilateral right of the Government and there was no contractual obligation to exercise the option. The Air Force notes that the RFP, which led to the current Lanson contract, contained the standard clause providing that while the option quantity would be evaluated, "[e]valuation of option will not obligate the Government to exercise the option or options." The Air Force also notes that Lanson's contract contains an option provision stating that the contracting officer "may exercise the option." Further, the Air Force notes that procurement regulations permit the contracting officer to exercise an option only if it is determined to be the most advantageous method of fulfilling the Government's need.

Where the record shows, as here, that the option was exercisable at the sole discretion of the Government, our Office will not consider under our Bid Protest Procedures, the incumbent contractor's contention that the agency should have exercised or is obligated to exercise contract option provisions. See C.G. Ashe Enterprises, 56 Comp. Gen. 397 (1977), 77-1 CPD 166. Accordingly, this aspect of Lanson's protest is dismissed.

Third, Lanson contends that, even if the Air Force did not actually execute the modification exercising the option, the actions of the parties were enough to create a binding agreement to purchase the reduced option quantity. Lanson points to its president's trip to Wright-Patterson Air Force Base made with the understanding that both parties would execute the modification. Lanson views the Air Force's preparation and presentation of the modification to its president as an offer and Lanson's execution as requested as its acceptance.

In our view, the record establishes that the Air Force did not intend that the option be exercised when the modification was executed by Lanson's president. Instead, it is clear that the Air Force believed that, just as was stated on page 1A of the modification, the reduction in the option quantity was not effective until the contracting officer signed the modification. From the Air Force's perspective, there could not be a binding agreement at least until the modification was signed by its contracting officer. We believe that the Air Force's actions are consistent with that view. Accordingly, we conclude that the actions of the parties did not create a binding agreement.

Fourth, Lanson contends that, if a competition is to be held, it should be on the basis of formal advertising, not negotiation. Lanson notes that the existing data package is adequate for companies in the specialized container field to provide the required container assemblies. In reply, the Air Force reports that a data package adequate for formal advertising is not available and could not be prepared and approved within the available time. Further, the Air Force did not determine that it was necessary to restrict the competition to companies in the specialized container field.

We will not object to a determination to negotiate on the basis advanced by the Air Force where any reasonable ground for the determination exists. See 41 Comp. Gen. 484, 492 (1962). Here, the record provides a reasonable basis for the Air Force's determination because adequate time was unavailable to assemble a proper data package and there was no basis to restrict the competition to companies in the specialized container field. Thus, this aspect of Lanson's protest is without merit.

Fifth, Lanson contends that any competitor other than Lanson would receive a distinct competitive advantage unless there is an evaluation factor for Government-furnished equipment. Lanson explains that, in connection with its current contract, it developed its own production equipment. Therefore, if the Government furnishes equipment to the successful offeror under the instant RFP, Lanson will be at a competitive

disadvantage since it does not need the Government equipment. Lanson argues that the RFP is improper because it does not contain a factor to eliminate Lanson's competitive disadvantage as required by Defense Acquisition Regulation (DAR) § 13-503 (1976 ed.).

In response, the Air Force states that no adjustment factor is necessary because the Government equipment is available to the successful offeror. The Air Force notes that the RFP leading to Lanson's current contract contained an evaluation factor for Government-furnished equipment because only Coloney could use the equipment at that time.

DAR § 13-503 provides that, in negotiated procurements, competitive advantage arising from the use of Government production and research property shall be eliminated by the use of an evaluation factor. Usually, the evaluation factor is employed in a solicitation when only one firm is permitted to use Government-furnished equipment. We are not aware of a situation, like this, where an evaluation factor was employed because a firm did not require Government-furnished equipment, which the Government was willing to make available to any firm.

Our analysis begins with the premise that there is no legal requirement for the Government to furnish equipment to a successful offeror to be used in performing a Government contract. See Southwest Marine, Inc.; Triple "A" South, B-192251, November 7, 1978, 78-2 CPD 329. It is Government policy to eliminate competitive advantage by employing an evaluation factor when only one firm is permitted to use Government-furnished equipment in performing the required work. DAR § 13-501. However, when the Government equipment can be furnished to any offeror, in our view, the Government has not participated in establishing a competitive advantage. It is well settled that the Government has no obligation to eliminate a competitive advantage that a firm may enjoy because of its own particular circumstances or because it gained experience under a prior Government contract or performed contracts for the Government unless such advantage results from a preference or unfair action by the

agency. See, e.g., Varo, Inc., B-193789, July 18, 1980, 80-2 CPD 44; ENSEC Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD 34.

Here, firms other than Lanson arguably have a competitive advantage--or, in Lanson's terms, only Lanson has a competitive disadvantage--because Lanson previously acquired the necessary equipment and has no need for the Government-furnished equipment. Lanson has made no showing that its situation results from a preference or unfair action by the agency.

We conclude that Lanson's acquisition of equipment to perform its current contract, based on its business judgment, is the reason that Lanson believes it is now at a competitive disadvantage. Lanson's situation did not result from Government preference or unfair action. The Government has no legal obligation to eliminate Lanson's competitive disadvantage by effectively increasing the cost to the Government for the required assemblies. Accordingly, this aspect of Lanson's protest is without merit.

Finally, we note that under DAR § 13-506, where Government production and research property is offered for use in a competitive procurement, any costs incurred by the Government relating to making the equipment available (such as transportation and rehabilitation costs) will be included in the evaluation of bids or proposals to the extent such costs are not assumed by the user. This regulation applies whether or not a competitive advantage factor is included in the evaluation in accordance with DAR § 13-503. We assume that the Air Force will consider the provisions of DAR § 13-506 prior to any award in this case.

Protest denied.

Milton J. Socolar

Acting Comptroller General
of the United States